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No.

81441 MAR 4 - 1999

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ERNEST C. ROE, WARDEN, *Petitioner,*

v.

LUCIO FLORES ORTEGA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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APPENDIX - A -

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA,	) CV F-95-5612
	) GEB HGB P
<i>Petitioner,</i>)
v.	) ORDER RE:
	) FINDINGS &
ERNEST C. ROE,	) RECOMMENDATION
	) (#27) AND
<i>Respondent.</i>	) OBJECTIONS (#28)
)
)

Petitioner, a state prisoner proceeding in forma pauperis with appointed counsel, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On April 3, 1997, the magistrate judge filed findings and recommendation herein which were served on both parties and which contained notice to both parties that any objections to the findings and recommendation were to be filed within thirty (30) days. On May 2, 1997,

petitioner filed timely objections to the findings and recommendation.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendation to be supported by the record and by proper analysis.

Accordingly, THE COURT HEREBY ORDERS that:

1. The Findings and Recommendation filed April 3, 1997, is adopted in full; and
2. Petitioner's application for writ of habeas corpus is denied.

DATED: June 30, 1997

GARLAND E. BURRELL
UNITED STATES DISTRICT JUDGE

APPENDIX - B -

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUCIO FLORES ORTEGA,	) No. CV F-95-
<i>Petitioner,</i>	) 5612
	) GEB HGB P
v.)
	) FINDINGS AND
ERNEST C. ROE,	) RECOMMENDATIONS
<i>Respondent.</i>	) RE: PETITION FOR
	) WRIT OF HABEAS
_____	) CORPUS

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C § 2254.

BACKGROUND

Petitioner was charged by information in case number 490730-9 in the Superior Court of the State of California, County of Fresno, with murder, with a personal use of a deadly weapon enhancement, and two counts of assault with a deadly weapon. Pursuant to a plea bargain, petitioner pled guilty to second degree murder and on November 10, 1993, was sentenced to 15 years to life in state prison.

Petitioner did not file a timely notice of appeal. However, on March 24, 1994, petitioner attempted to file a notice of appeal but was advised by the Clerk of the Fresno County Superior Court that his notice was not filed because it was untimely. Petitions for a writ of habeas corpus were filed with both the California Court of Appeal for the Fifth Appellate District and with the California Supreme Court alleging ineffective assistance of trial counsel due to counsel's failure to file a timely notice of appeal. Both petitions were denied, the latter on January 18, 1995.

The instant petition for a writ of habeas corpus was filed in this court on July 27, 1995, and respondent's answer, filed on November 17, 1995, concedes petitioner has exhausted his state court remedies.

DISCUSSION

On October 13, 1993, the date set for his jury trial to commence, petitioner appeared in Superior Court with his court appointed public defender, Ms. Nancy

Kops, and a state certified Spanish interpreter and entered a plea of guilty to second degree murder. The plea was entered pursuant to a plea bargain and *People v. West*, 3 Cal.3d 595 (1970), permitting petitioner under California law to deny commission of the crime while admitting there was sufficient evidence to convict him. In accord with the bargain, the prosecutor moved to strike the personal use of a deadly weapon enhancement allegation and to dismiss two additional felony charges of assault with a deadly weapon.

In the instant petition, petitioner alleges that Ms. Kops was constitutionally ineffective in failing to file a notice of appeal on his behalf after promising to do so.

This court ordered an evidentiary hearing to be held on the limited issue of the credibility of petitioner's assertions that Ms. Kops promised to file a notice of appeal on his behalf. The court appointed the Office of the Federal Defender to represent petitioner in connection with the evidentiary hearing.

The evidentiary hearing was held on January 24, 1997. Petitioner was represented by Assistant Federal Defender Ann H. Voris and respondent was represented by Paul E. O'Connor, Deputy Attorney General of the State of California. Testimony was received from petitioner, from Ms. Kops, and from Cheryl Saucedo, the certified court interpreter at both the change of plea hearing on October 13, 1993, and the sentencing hearing on November 10, 1993.

At the conclusion of the evidentiary hearing, this court noted on the record, "It is clear to me that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game."

This court made a factual finding that petitioner had not met his burden of proving by a preponderance of the evidence that Ms. Kops had promised to file a notice of appeal on his behalf. (Evidentiary hearing transcript, p. 75-76.)

This court further found that petitioner did not consent to Ms. Kops' failure to file a notice of appeal. (Evidentiary hearing transcript, p. 74.)

Counsel were asked to file post-hearing briefs addressing the question of whether petitioner is entitled to relief under *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995), in light of the above factual findings. Post-hearing briefs on behalf of both parties were filed on March 14, 1997. Although the parties were granted until March 21, 1997, to file a response to the other party's post-hearing brief, no such responses were filed.

In *Stearns, supra*, Stearns pleaded guilty to bank robbery in the federal district court and was sentenced. He did not file an appeal, but two years later filed a habeas petition alleging that his attorney failed to file an appeal, as requested. Relying upon its earlier decisions in *United States v. Horodner*, 993 F.2d 191 (9th Cir. 1993) and *Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992), a state conviction, the Ninth Circuit reversed the

district court's denial of the petition holding that "the answer turns on the question of whether the petitioner consented to the failure to file a notice of appeal. Of course, Stearns says that he did make a request, but he need only show that he did not consent to the failure to file." *United States v. Stearns, supra*, 68 F.3d at 330.

The court further held that prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984) if it is established that counsel's failure to file a notice of appeal was without the Stearns' consent. [sic] *United States v. Stearns, supra*, 68 F.3d at 329.

The Stearns court also noted that cases from two other circuits had held that an attorney's failure to appeal after a guilty plea results in ineffective assistance of counsel without a specific showing of prejudice, citing to *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) and *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993). Regarding these cases, the *Stearns* court stated:

The law applied in those cases was slightly different from the law of this circuit because in those cases the petitioner had requested that an appeal be filed, and counsel had not followed the request. *Castellanos*, at least, put much weight on the need for that request. 26 F.3d at 719. In doing so it relied on cases where a request was made after a trial, and stated that a "[r]equest" is an important ingredient in this formula."

United States v. Stearns, supra, 68 F.3d at 330.

Noting that both *United States v. Horodner, supra*, and *Lozada v. Deeds, supra*, involved habeas petitions filed after convictions following trial, respondent argues that petitioner is not entitled to relief under *Stearns* because that case states a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) and has no retroactive application. *Teague* held that a new rule of law will not be applied to cases on collateral review where conviction was final prior to the new rule's announcement. *Id.* at p. 310. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became

final." *Id.* at p. 301; see also *Penry v. Lynaugh*, 492 U.S. 302, 313, (1989).

The Supreme Court recently spelled out how *Teague* must be applied where the State argues that a petitioner seeks the benefit of a new rule of constitutional law:

In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must "[s]urve[y] the legal landscape as it then existed," and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Finally, even if the court determines that the defendant seeks the benefit of the new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Caspari v. Bohlen, 510 U.S. 383, 389-390 (1994) (internal citations omitted).

In our present case, petitioner was sentenced on November 10, 1993, and had 60 days within which to file a notice of appeal. California Rules of Court, rule 31(a). No notice of appeal was filed within that time and petitioner's conviction therefore became final on January 9, 1994.

The Ninth Circuits [sic] decision in *Teague* was filed on October 12, 1995.

Surveying the legal landscape of California as of January 9, 1994, a sentencing court was not required to advise a defendant of his appeal rights following a guilty plea. Cal. Rules of Court, rule 470. However, in a noncapital criminal case, where the defendant would be entitled to the appointment of counsel on appeal, the attorney representing the defendant at trial was under a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." Cal. Pen.

Code, § 1240.1, subd. (a). Subdivision (b) of section 1240.1 provided in pertinent part:

(b) It shall be the duty of every attorney representing an indigent defendant in any criminal . . . case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue such relief as may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

In the present case, Ms. Kops was appointed to represent petitioner, an indigent, who entered a guilty plea to second degree murder. Ms Kops testified that in her opinion the only grounds for appealing would have been that the sentencing court abused its discretion in denying probation and an appeal on that ground "would almost certainly fail." (Evidentiary hearing transcript, p. 43-44.) Ms. Kops also testified that while she would not have encouraged petitioner to file an appeal, had he asked her to do so she would

"still go ahead and file it." (Evidentiary hearing transcript, p. 49.)

It would appear, therefore, that Ms. Kops would have been under no statutory duty to file an appeal on behalf of petitioner under California law. No California or federal case law has been found holding, prior to the decision in *United States v. Stearns*, *supra*, 68 F.3d 328, that an attorney, either retained or appointed, had a duty to file a notice of appeal for a defendant following a guilty or no contest plea, absent a specific request by the defendant. In fact, federal cases specifically stated that an attorney had no duty to advise his or her client of the right to appeal following a guilty plea and, in the absence of a request, failure to file a timely notice of appeal after a guilty plea did not constitute ineffective assistance of counsel. *See, e.g., United States v. Lewis*, 880 F.2d 243, 246 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 528 (9th Cir. 1985) (and cases cited); *see also Belford v. United States*, 975 F.2d 310,

314 (7th Cir. 1992) (and cases cited); *Castellanos v. United States*, *supra*, 26 F.3d 717, 719; *Carey v. Leverette*, 605 F.2d 745, 746 (4th Cir. 1979) (despite a earlier contrary holding by the same circuit in *Nelson v. Peyton*, 415 F.2d 1154 (4th Cir. 1969).

It seems clear under the "legal landscape as it then existed," no California court "would have felt compelled by existing precedent" to hold that in the absence of petitioner's consent, Ms. Kops' failure to file a timely notice of appeal constituted a denial of effective assistance of counsel. *See Caspari v. Bohlen*, *supra*, 510 U.S. at 390.

Turning to the third step of the analysis, it also seems clear that the "new rule" does not fall within either of the two narrow exceptions to the nonretroactivity principle. *Teague* held that a new rule may still be applied retroactively if it fits into one of two narrow exceptions. First, a new rule should be applied retroactively if it "places certain kinds of primary,

private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 307 (citations omitted). Or, as the Supreme Court further explained in *Sawyer v. Smith*, 497 U.S. 227 at page 241, the first exception "applies to new rules that place an entire category of primary conduct beyond the reach of a the criminal law [sic] . . . or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense, . . . The second *Teague* exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." (citations omitted.)

Clearly, the new rule announced in *Stearns* would not fall within the first *Teague* exception.

As to the second exception, the *Sawyer* court further explained, "It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also, "alter our understanding of the bedrock procedural elements" essential to the fairness of the proceeding." *Sawyer v. Smith, supra*, 497 U.S. at 242. And, "As we stated in *Teague*, because the second exception is directed only at new rules essential to the accuracy and fairness of the criminal process, it is 'unlikely that many such components of basic due process have yet to emerge.'" 467 U.S. at 243.

The *Stearns* rule, that a defendant who does not consent to his attorney's failure to file a timely notice of appeal will be deemed to have received prejudicial ineffective assistance of counsel, would appear to have nothing to do with the accuracy of the trial nor would it alter the underlying procedural elements essential to the

fairness of the proceeding. At most, retroactive application of the *Stearns* rule to this case would allow petitioner to file a belated appeal in the state courts if the trial court would issue a certificate of probable cause for such an appeal pursuant to California Penal Code, section 1237.2.¹⁷ [sic; 1237.5]

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus be DENIED.

1. California Penal Code, section 1237.2 provides:

No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following admission of violation, except where both the following are met:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

These findings and recommendations are submitted to the assigned District Judge, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Oilseed*, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 3, 1997

HOLLIS G. BEST
UNITED STATES MAGISTRATE JUDGE